1979

State of Utah v. Lester Romero : Brief of Defendant Appellant

Utah Supreme Court

John Walsh; Attorney for the Appellant;
Stephen G. Schwendiman; Assistant Attorney General;

IN THE SUPREME COURT OF THE STATE OF UTAH

NO. 216937

STATE OF UTAH, by and through
Director Assistance Payment
Administration, Utah State
Department of Social Services,

Plaintiff-Respondent,

vs.

No. 16537

LESTER ROMERO, aka
RALPH G. ROMERO,

Defendant-Appellant.

BRIEF OF DEFENDANT - APPELLANT

APPELLANT APPEALS FROM A JUDGMENT
ENTERED IN FAVOR OF THE
PLAINTIFF

THIRD DISTRICT COURT
IN AN FOR SALT LAKE COUNTY,
STATE OF UTAH
HONORABLE DEAN CONDER, DISTRICT JUDGE

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STATEMENT OF KIND OF CASE

Action by Plaintiff to recover assistance payments, which were allegedly extended to Defendant because of misrepresentation to the Department of Social Services.

DISPOSITION IN LOWER COURT

The trial court heard the matter on the merits and granted judgment to the Plaintiff

RELIEF SOUGHT ON APPEAL

Appellant seeks an order vacating the judgment in the lower court, and reversing and remanding the matter to the lower court with instructions to dismiss the case.

STATEMENT OF THE FACTS

The Appellant received public assistance from the State of Utah in an amount of Eleven Thousand Nine Hundred Eight-one and 21/100 dollars ($11,981.21) from the Respondent during the period of February, 1969 through November, 1973 intermittently.

The Respondent filed a complaint to recover the assistance payments from the Appellant for misrepresentation in the applications for the assistance on January 11, 1974.

At the time of the filing of the complaint, the Appellant retained an attorney to represent him, and the same filed a set of interrogatories, a set of requests for admission and a request for the production of documents, on April 5, 1974.

The Respondent file its answers to interrogatories and answers to requests for admission on July 18, 1978, some four years and three and a half months latter.

The Respondent filed his request for trial setting on the 15th of September, 1978, and the attorney for the Appellant withdrew from the case on the 25th day of September, 1978. Thereafter the Appellant went unrepresented to and through the trial on the merits which ended on June 15, 1979.

From judgment in favor of the Respondent the Appellant appeals.

ARGUMENT ONE

THE MATTER SHOULD HAVE BEEN DISMISSED BECAUSE OF THE RESPONDENTS FAILURE TO RESPOND TO APPELLANTS REQUESTS FOR ADMISSION.

In the facts of the case, the Appellant served a set of Requests for Admission on the Respondent, and the latter failed to either admit or deny or otherwise respond to the same until some four years, three and a half months latter.

Rule 36(a), in relevant part, provides:

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter signed by the party or by his attorney, but, unless the court shortens the time a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him . . .

And Rule 36(b) provides:

> Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission . . .

Well over a 1,000 days had expired prior to the time that the Respondent responded to the Requests for Admission, nor have they moved to withdraw or amend their admissions. Respondent have therefore admitted the matters contained in the Appellants Requests for Admission, which include:

> That Defendant (Appellant) had no (a) income which was not reported to you, or (b) assets which were not reported to you, or (c) of which you were not aware during periods while he was receiving

assistance payments.

Also,

That Defendant (Appellant) was entitled under applicable law and the determination made by your office to receive each assistance payment received by him during the discovery period.

Also,

That Defendant is not indebted to you in any amount.

The Appellant is not limited to the sanctions of Rule 37(c) because Rule 37(c) deals only to parties who unjustifiably fail to admit facts, but who nevertheless have responded to the request. By failing to respond to the requests, the facts are admitted under Rule 36(a), and the provisions of Rule 37(c) do not apply. Note Schmitt vs. Billings, et al., No. 16084, filed August 24, 1979, not yet printed in the Pacific Reporter or Utah Reporter.

Hence, "As (Respondents) have admitted all of the facts noted supra, there remains no litigable issue, and (Appellant) is entitled to judgment against the . . . (Respondents). . ." note page 4, of Schmitt vs. Billings, et al. also W. B. Gardner, Inc., vs. Park West Village, Inc., 568 P2d 734, Utah Supreme Court 1977).

ARGUMENT TWO

THE MATTER SHOULD HAVE BEEN DISMISSED BECAUSE OF THE RESPONDENTS FAILURE TO RESPOND TO APPELLANT'S INTERROGATORIES.

In the facts of the case, the Appellant served a set of Interrogatories on the Respondent, and the latter failed to respond to the same for over four years.

Rule 33(a) states:

> Any party may serve upon any other party written interrogatories to be answered by the party served . . . The Party upon whom the interrogatories have been served shall serve a copy of the of answers and objections if any, within 30 days after service of the interrogatories . . .

Rule 37(d) states:

> If a party or an officer, director, or managing agent of a party or a person designedated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories . . . the Court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2) of this Rule.

Rule 37(b)(2)(C) provides:

> An order striking out pleadings, or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

As a result thereof, the party on whom the interrogatories are served has 30 day in which to respond, if they fail to do so, the Court may strike out the pleadings, dismiss the action or render a judgment by default against the respondents.

In the Utah Supreme Court case of W. B. Gardner, Inc., vs. Park West Village, Inc., 568 P2d 734, 1977, the Court

reasoned from the Naive v. Jones case, Ky., 353 S.W.2d 365 (1961), that after 10 months the plaintiff had not undertaken to object to the interrogatories, to request additional time, or to explain or justify his failure to answer, and therefore and for other reasons sustained the dismissal of the action.

ARGUMENT THREE

THE MATTER SHOULD BE DISMISSED WHERE THE FAILURE TO RESPOND TO RESPOND TO DISCOVERY IMPEDES TRIAL ON THE MERITS AND MAKES IT IMPOSSIBLE TO ASCERTAIN WHERTHER THE ALLEGATIONS OF THE COMPLAINT HAVE ANY FACTUAL MERIT.

In the case at hand, the Respondent asserted at trial that if the Appellant had any property five years before filing for assistance he must so indicate on the application. Thereafter the Respondent took it upon themselves to prove that the Appellant was not entitled to the assistance in 1969, then filed the complaint in 1974, and then brings the man to trial in 1979.

The basis for the trial in 1979 is what occurred in and after 1964. The record is replete with situations and circumstances which the Respondent could not remember clearly because of a head injury since their occurrance and the length of time since their occurrance. (Please note pages 315 and 322 of the transcript as examples.

In the Utah Supreme Court case of W. B. Gardner, Inc., vs. Park West Village, Inc., 568 P2d 734, 1977, at page 738, the Court stated the following:

> The extreme sanction of default or dismissal must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. Under Rule 37(d) sanctions are justified without reference to whether the unexcused failure to make discovery was wilful. The sanction of default judgment is justified where there has been a frustration of the judicial process, viz, where the failure to respond to discovery impedes trial on the merits and makes impossible to ascertain whether the allegations of the answer have any factual merit.

In the matter at hand, if the discovery was responded to on time, the Appellant would have had the benefit of having less time to pass over to reconstruct what had happened, concommitantly, the Appellant would have had the benefits of legal counsel, which he did not have at the time of trial.

Therefore, the delay did infact impede the trial on the merits and made it impossible for the Appellant to ascertain whether the allegations of the complaint had any factual merit.

The Court further reasoned in the Gardner, as follows:

> A (party) may not ignore with impunity the requirements of Rule 33 . . . A party to an action has a right to have the benefits of discovery procedure promptly, not only in order that he may have ample time to prepare his case, but also in order to bring to light facts which may entitled him to summary judgment or induce settlement prior to trial. The rules were designed to secure the "just, speedy and inexpensive determination of every action," Rule 1.

ARGUMENT FOUR

THE MATTER SHOULD HAVE BEEN DISMISSED FOR FAILURE TO PROSECUTE.

According to the facts of the case, the complaint was filed on January 11, 1974, and the trial was concluded on June 15, 1979, for a total time of almost five and one half years.

The time, however, between when the answer was filed and a request for trial was filed was almost four and one half years to the day.

As a result, but for the failure of the Respondent to prevent unnecessary delay in the litigation, the total time of the matter which was five and one half years could have arguably been reduced to one year.

In 24 AmJur 2d §59 is the following:

> As a general rule an action may be dismissed or a nonsuit granted because of the Plaintiff's failure to appear and prosecute his case, or for his failure to prosecute his case diligently. The Federal Rules of Civil Procedure specifically provide for dismissal of an action, on motion of the defendant, for failure of the Plaintiff to prosecute his actions or claims, and similar provisions are found in the practice statutes and rules of practice in other jurisdictions. Such a provision for dismissal for want of prosecution is applicable at the pleading stage of the case. Its obvious purpose is to prevent unnecessary harassment and delay in litigation.

In a 1975, Utah Supreme Court case, the Court stated that where after two years the Plaintiff was not ready for trial, had not filed a bond, had made no discovery and had been dilatory in responding to Defendant's discovery, the matter was properly dismissed. Maxfield v. Fishler, 538 P.2d 1323.

Also note, Brasher Motor & Finance Co. v. Brown, 23 U.(2d) 389, 461 P.2d 404, and Tennessee Pipeline Co. v. Jackson,

29 U. (2d) 259, 508 P. 2d 528, and Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P. 2d 876.

ARGUMENT FIVE

AS A MATTER OF LACHES THE MATTER SHOULD HAVE BEEN DISMISSED.

As a matter of mere equity and fairness, the matter should have been dismissed. Under the facts, a reasonable man could have assumed that the State had abandoned it suit, and as a result, concommitantly he relaxed his diligence to defend.

In 24 AmJur 2d §59, at page 50 is the following:

> The question of laches depends on whether, under the facts and circumstances of the particular case the Plaintiff is chargeable with want of due diligence in failing to proceed with reasonable promptitude.

In the facts at hand, if the Plaintiff had with due diligence pursued the matter, the Defendant would have been represented by counsel. The Defendant would have had less time overwhich to pass, in order to reconstruct an account of what had taken place; he would have been able to better recollect any statements or representations, which were the basis of the judgment and could clearly have been better prepared to put on a defense. (According to the transcript the Respondent did not even have the benefit of his file when he represented himself, which was due to the extensive inactivity in the case)

Therefore as a matter of laches, the matter should have been dismissed. Please note Manson v. First National Bank,

366 Pa 211, 77 A2d 399, also Hollenback v. California Western R. R., C.A. 9th, 1972, 465 F.2d 122, also, Sellick v. Helson, C.A. 9th, 1972, 459 F. 2d 670, also, Maxey v. Citizens National Bank of Lubbock, Texas, C.A. 5th, 1972, 459 F.2d 56.

CONCLUSION

In the facts of this case, we have an individual who was at one time represented by Counsel. At the time of the representation by Counsel, the individual did nothing to delay the matter, in fact filed timely each of the documents required of him.

The Plaintiff in the matter merely filed a complaint, and did nothing further to forward the matter until some four and one half years later, and then he filed documents which were over four years late.

The Defendant in the meantime, was no longer represented by Counsel, furthermore he could reasonably assume that the Plaintiff had abandoned the case.

At the time of trial the Defendant went unassisted, and infact could have summarily handled the matter if he had an attorney. Furthermore, over the vast time period the file was apparently lost, and so the Defendant while unassisted, proceeded with the trial without so much as the file on the matter.

The Court could and should have dismissed the matter for any one of several reasons including: (1) Failure to respond to the Request for Admissions, timely; (2) Failure to respond to the Interrogatories, timely; (3) Delay in the responding to the discovery, which concommitantly delayed the trial; (4) Failure to Prosecute, and (5) Laches.

The Court could have acted on its own motion to do any of the above-named remedies, but did not, and perhaps it did not because it was not fully informed of the procedural errors in the matter. Yet the Court should have been so informed, and perhaps would have if the Defendant had an Attorney at the time of trial, and he did have at one time, but due to the great time in the delay he did not at the time when it came on for trial.

For failure to respond to the Requests for Admissions, the matter submitted in the same are deemed admitted and so at the time of the trial there were no litigable issues because the Plaintiff had not moved for additional time or for permission to amend or alter the admissions.

Without doing so, the matter was essentially res judicata, and should have never gone to trial, and for the same reason the judgment ought to be set aside, and the matter dismissed.

Respectfully submitted this 5th day of December, 1979.

JOHN WALSH
ATTORNEY AT LAW

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered three copies of the Brief of Appellant, to the Respondent, by delivering the same to Stephen G. Schwendiman, Assistant Attorney General, 140 West North Temple, Suite 234, Salt Lake City, Utah 84103, this 5th day of December, 1979.

JOHN WALSH